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Supreme Court, U. S.
FILED
MAR 20 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-6123

JOHNSON WASHINGTON, JR.

PETITIONER

V.

STATE OF LOUISIANA

RESPONDENT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA

MELVIN P. BARRE
DISTRICT ATTORNEY
29TH JUDICIAL DISTRICT

NORMAN J. PITRE
ASSISTANT DISTRICT ATTORNEY
29TH JUDICIAL DISTRICT

WALTER L. SMITH, JR.
ASSISTANT ATTORNEY GENERAL
STATE OF LOUISIANA

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I. The Court should deny certiorari as the imposition of the Death Penalty for First Degree Murder under existing Louisiana Law violates neither the Fourteenth nor the Eighth Amendment of the United States Constitution.

Petitioner alleges that the procedures for imposing the death penalty for first degree murder contain serious flaws which make it unconstitutional as cruel and unusual punishment. The State of Louisiana contends that such is not the case.

In his application for certiorari petitioner appears to adopt the arguments of State v. Selman, No. 74-6065, (filed Feb. 24, 1975). Specifically, these contentions were as follows:

1. That the District Attorney's discretion regarding whether or not to prosecute, and similar discretion as to the charge, are unconstitutional in capital cases, as they encourage discrimination in contravention of the Equal Protection Clause of the Fourteenth Amendment.

2. That the discretionary power of the Governor of the State of Louisiana is unconstitutional for the same reasons.

3. That plea bargaining as practiced in Louisiana is unconstitutional for the same reasons.

4. That because the jury may return any of a number of verdicts, none carrying a death penalty, as responsive to a charge of aggravated rape, juries in Louisiana in reality retain the same degree of discretion in sentencing which was condemned in Furman v. Georgia, supra, in spite of the fact that the death penalty is statutorily mandated upon a finding of guilty of aggravated rape. Additionally, petitioner urges that the imposition of the death penalty in this case is cruel and unusual punishment as contemplated by the Eighth Amendment to the United States Constitution.

The State of Louisiana contends that none of petitioner's allegations raise a question of violation of the United States

Constitution sufficient to move this Court to grant certiorari for review and herein formally readopts its arguments in Selman, supra, as set out below.

The petitioner attacks Louisiana's system for imposing capital punishment for the crime of First Degree Murder. This system in capital cases was amended by the Louisiana Legislature following this Court's ruling in Furman v. Georgia, supra, to follow the guidelines set forth therein. Presently, the only body which proscribes the penalty of death when one is convicted of certain enumerated crimes in Louisiana, is the Louisiana Legislature. The Louisiana Legislature has taken the power to proscribe the death penalty for those convicted of capital crimes out of the hands of the judge and jury.

This was pointed out by the State of Louisiana in its original brief to the Louisiana Supreme Court in the Selman case at page 5 in the following language:

> "Defendant reserved Bill of Exception No. 6 because of the Court's imposition of the sentence of death.
>
> In State v. Myers, 261 La. 100, 259 So.2d 27 (1972), a case decided by the Supreme Court of Louisiana on February 21, 1972, rehearing denied on March 27, 1972, this Court upheld the death penalty for aggravated rape, although the victim's life was neither taken nor endangered. The Court held that such a penalty did not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. The case upheld a long line of decisions by our Supreme Court.
>
> In June of 1972, the United States Supreme Court handed down its decision in Furman v. Georgia, 92 S.Ct. 2726, 408 U.S. 245 (1972). The United States Supreme Court decision was adopted by an extremely divided court in which all nine Justices wrote separate opinions. Five Justices concurred in the decision and four Justices dissented. Each of the five Justices in the majority based his decision on a different rationale. The State of Louisiana urges that a proper interpretation of Furman v. Georgia, supra, does not hold that the death penalty itself is unconstitutional. The proper interpretation of Furman is that the legislature may not vest the decision of whether or not to

proscribe the death penalty solely in the judge or jury. Once the jury has determined that the defendant is guilty, that is, that the defendant has perpetrated acts which constitute the elements of the crime, then they should not be allowed to further determine whether the defendant should receive the death penalty or a prison sentence. The reason behind this is that such a procedure allows the jury to arbitrarily decide the defendant's fate, not on the basis of law, but by considering other factors such as racial, social standing, and other individual factors. A sentencing provision which emcompasses such a system allowing a jury to arbitarily and, perhaps, discriminatorily proscribe death would constitute cruel and unusual punishment. The majority of the decisions by the Justices contained no language to the effect that the death penalty would be unconstitutional if the crime so punished did not involve actual physical beating or grave bodily harm. Such a decision would throw justice into an 'eye for an eye' rationale. A reading of the various opinions indicates that a majority of the Justices accept the proposition thaat the imposition of the death penalty cannot be delegated to the jury for an arbitrary decision. Further, that aggravated rape is such a heinous crime that the death penalty would not be excessive in itself, if applied to such a crime.

In light of this, the Louisiana Legislature met in 1973 and amended their own delegation of the death penalty from the jury in capital cases. The penalty reads as follows: 'Whoever commits the crime of aggravated rape shall be punished by death.' (Emphasis added.) However, in order to take the final decision out of the hands of the jury, the legislature amended our Code of Criminal Procedure, Article 814, the responsive verdict article, to remove the verdict of 'guilty without capital punishment.' The legislature has spoken and if the jury, as finders of fact, determines that the elements of aggravated rape are proved and the defendant guilty, then the punishment shall be death. A determination that the sentence of death for the offense of rape would be cruel and unusual punishment, per se, under the Eighth Amendment of the United States Constitution would thwart the legislative will, something that the majority of the Justices of the United States Supreme Court indicated they were not willing to do. The State submits that the constitutional objections struck down in Furman v. Georgia, supra, have now been corrected by the Louisiana Legislature. This crime occurred after the amendments to our criminal laws correcting the deficiencies in our imposition of the death penalty and the jury found the defendant guilty of aggravated rape. There was no discretion in the sentence. Once found guilty, the death penalty must be applied. It is submitted that the law, as established by this Court in State v. Myers, supra, is still valid and the rationale was unaffected by Furman v. Georgia except to the extent of the procedural deficiencies discussed above, which have now been corrected by our legislature."

The State of Louisiana feels that with regard to petitioner's first three arguments as enumerated above, the Court has little reason to grant certiorari. It is incumbent upon any system of

government that certain officials therein must make decisions. The making of these decisions requires as a matter of course the use of sound discretion. To accept the thrust of petitioner's first three arguments would be to remove an element necessary to the smooth functioning of the governmental processes. The exercise of sound discretion and the holding of a position of responsibility are complementary.[1]

Thus, these arguments are not confined to capital cases but are involved in all criminal prosecutions at both the federal and state levels. The prosecutor's discretion is a necessary part of the criminal justice system, which is recognized and approved at both the federal and state levels. The prosecutor does not convict or sentence, juries convict and, in capital cases, the legislature proscribes the sentence of death. The thrust of Furman is that once a jury has found the defendant guilty of a capital offense, the jury or judge should not then be left with the question of whether that defendant will be sentenced to death or not.

It is fundamental law that a grand jury indictment is not evidence of guilt at the subsequent trial. As a further qualification of the prosecutor's power in capital cases brought in Louisiana, our Code of Criminal Procedure provides in Article 382:

> "Art. 382. Methods of Instituting criminal prosecutions
>
> A prosecution for an offense punishable by death, or for an offense punishable by life imprisonment, shall be instituted by indictment by a grand jury. Other criminal prosecutions in a district court shall be instituted by indictment or by information..."

Therefore, in Louisiana in a capital case there must be a grand jury indictment whereby all other prosecutions may be instituted by a Bill of Information.

The prosecutor's discretion in seeking a grand jury indict-

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[1] These issues are presently before this Honorable Court in Roberts v. Louisiana, No. 75-5844, October Term, 1975, which is set for oral argument on March 30, 1976.

ment in a capital case or his discretion in plea bargaining is clearly not unconstitutional, but additionally is outside the time frame and circumstances at which Furman was directed. He is not involved in the jury's deliberation of guilt or innocence and, once a verdict of guilty is found, he is powerless to prevent the imposition of the death penalty. Furman was aimed at the time when the defendant was found guilty of an offense and at that point whether he lived or died might be determined by his station in life and its impression on the judge or jury when determining sentence. For these reasons, the State feels these questions should not be considered.

The executive clemency argument is additionally an attack on a process long recognized and established for the President of the United States and the chief executives of the various state governments. Such powers are within the executive branch of government and outside of the judicial processes of determining guilt or innocence or imposition of sentence. This argument presents no question which should be reviewed, particularly with no showing that the Governor's Office has ever acted in a discriminatory manner in exercising this traditional power.

Petitioner's main argument concerns the system of responsive verdicts used in Louisiana, enacted in response to this Court's holding in Furman v. Georgia, 408 U.S. 313. To a charge of First Degree murder, a jury in Louisiana may return responsive verdicts of guilty of Second Degree murder, guilty of manslaughter, or not guilty. La. C.Cr.P. Art. 814. None of the responsive verdicts carries the death penalty, as does the crime of first degree murder. Petitioner contends that under this system, a jury may, in a moment of compassion, return a responsive verdict against a defendant who is, in fact and under the law, guilty of first degree murder, which carries a mandatory death penalty. Petitioner extends this highly speculative assertion to support the proposition that under the guise of a constitutionally sound, responsive verdict system, lurks yet another vehicle of invidious discrimination which allows arbitrary and selective imposition of the death penalty by juries. It is, according to petitioner, highly susceptible to utilization as a

The State of Louisiana feels that petitioner's argument is adequately answered by State law. Therefore, it is not necessary that the case be considered in this Court. The jury, in Louisiana, is entrusted with the responsibility for determining guilt or innocence in all criminal cases. La. Const. Art XIX, Section 9; La. C.Cr.P. Art. 802. Once the jury determines guilt, the Court imposes sentence as prescribed by the legislature. La. C.Cr.P. Art. 871. The jury has no discretion whatsoever in determining sentence, the situation condemned in Furman, upon which petitioner relies so heavily. The ramifications of this attack on the responsive verdict system are not difficult to imagine; the rational extension of the argument commands that jurors be amenable to examination by the Court and be held accountable for the reasons which prompted them to render the verdict which they did. If any juror expresses any degree of compassion for a defendant, the verdict must be overturned. It is submitted that, if allowed, petitioner's argument would effectively initiate the erosion of a right expressly guaranteed in the Constitution; the right to a trial by jury.

It is submitted that, in order for the constitutional guarantee of a trial by jury to be effective, jurors cannot be held accountable for the reasons which prompt them to vote as they do. Petitioner's argument requires this. In Louisiana, jurors take an oath to try the case in a just and impartial manner, and to render a verdict according to the law and the evidence. La. C.Cr.P. Art. 790. Barring obvious misconduct by a juror, the State feels that the verdict should not be inquired into, as it is manifest that such inquiry is constitutionally impermissable.

It is the jury's province, in the State of Louisiana, to apply the law as charged them by the judge to the evidence presented at the trial. Whether they return a verdict of guilty

to a responsive charge is a matter of law depending upon the evidence adduced at trial. Whether they disregard the law is a matter of jury nullification. Such an argument could just as easily be advanced where the jury returns a not guilty verdict. To uphold this "philosophy" would be to say the jury system itself is unconstitutional.

The State of Louisiana submits that its system of imposing capital punishment is now constitutionally permissable in that the Legislature imposes the death penalty for certain heinious offenses without delegating this authority to the judge or jury.

For these reasons, the State of Louisiana prays that the petition of Johnson Washington for Writ of Certiorari be denied.

II. Whether the Exclusion For Cause of Fourteen Veniremen on the grounds of Their Expressed Attitudes Toward The Death Penalty Violated Petitioner's Rights Under the Sixth and Fourteenth Amendments to the Constitution of the United States.

Petitioner asserts that the jury which convicted him was chosen in violation of the constitutional standards set out in Witherspoon v. State of Illinois, 391 U.S. 510, 88 S.Ct. 1770. Specifically, petitioner alleges that on voir dire, fourteen veniremen were excluded for cause merely because they voiced general objections to the death penalty, and not clear, unmistakeable indications that (1) they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at trial, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. Id., 391 U.S., at 522. The State of Louisiana feels, however, that these arguments are without merit, as a close inspection of the case makes clear. The following excerpts from the Jury Selection Transcript indicate clearly and unequivocally that the State's challenges for cause conformed to La. C.Cr.P. Art. 798(2), which was amended in response to the Witherspoon decision. That article states, in pertinent part:

"Art. 798. Causes for challenge by the state

It is good cause for challenge on the part of the state, but not on the part of the defendant, that:

(2) The juror tendered in a capital case who has conscientious scruples against the infliction of capital punishment and makes it unmistakable clear (a) that he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him, or (b) that his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt; or..."

A. Testimony of Excluded Veniremen Monroe Douglas:

(J.S.T. 155)

Q: "Would you under any circumstances ever vote for the death penalty?"

A: "No, sir, I don't think I would."

from this witness chair may show, you would not vote for a verdict that would necessarily carry the death penalty?"

A: "No, sir, I don't think so."

Harold E. Crow: (J.S.T. 160) "I don't think I could vote for the death penalty."

Q: "Under any circumstances? Regardless of what the evidence showed from the witness chair?"

A: "No, sir."

Steve Hill: (J.S.T. 255-256) (After having been sworn, this venireman sought out counsel for the State and the trial judge. The record shows that at the time of his swearing as a juror he believed "capital punishment" to be life imprisonment. Upon finding out that such was not the case, Hill made known that he could not sit as a juror in a capital case. He was excused under the provisions of La. C.Cr.P. Art. 796.)

Court: "...you feel at this time that you cannot sit on this case knowing that a guilty verdict would require the death penalty for the defendant?"

A: "I don't think I could vote to take a man's life, no, sir. A life sentence, maybe, or something like that."

Floyd A. Williams: (J.S.T. 270)

A: "...regardless of what the evidence from this witness chair showed, that you, personally, could never vote for a verdict knowing that such a verdict would send a man to the electric chair?"

A: (Indicates yes.)

Q: "Is that correct?"

A: "Yes, sir."

Roy A. Mongrue: (J.S.T. 273)

Q: "Do you say that, Mr. Mongrue, regardless of what the evidence shows from the witness chair? You just feel that whatever it shows, you would not vote for it?"

A: "I couldn't vote for it, no."

Q: "Whatever it shows, you would not vote for a verdict that would necessarily carry..."

A: "I felt the same way 25 years ago when I was here before."

James T. Breaux: (J.S.T. 273)

Q: "...Could you vote for such a verdict knowing that it would necessarily carry the death penalty?"

A: "No, I could not vote that way."

Q: "Do you say that regardless of what the evidence showed, sir?"

A: "That is correct."

Ronald L Brown: (J.S.T. 274) "Can I change my mind?"

Q: (Later) "In other words, you would not vote for the death penalty under any circumstances?"

A: "That's right."

Q: "Regardless of what the evidence might show?"

A: "Right."

William M. Carter: (J.S.T. 304)

Q: "Are you telling me, sir, that under no circumstances would you ever vote for a verdict knowing it would carry the death penalty regardless of what the evidence may show from the witness chair?"

A: "Right. Under no circumstances."

James Smith: (J.S.T. 321) "It is my opinion that the State's definition of reasonable doubt would not bring... would not bring guilt to a degree that would be necessary for me to convict a man."

(The trial judge subsequently excused Mr. Smith for personal reasons.) The State submits that the foregoing exchange is cause for challenge under La. C.Cr.P. Art 797(4) that the juror will not accept the law as given to him by the court.

James G. Volta: (J.S.T. 378)

Q: "Are your convictions against the death penalty so strong that you would refuse to even consider a verdict knowing that that verdict would necessarily carry the death penalty regardless of what the evidence showed?"

A: "Yes, I would."

Alvin J. Folse: (J.S.T. 379)

Q: (Mr. Bezou, counsel for defendant): "Mr. Folse, would you automatically vote against the imposition of capital punishment, that is, death, without regard to any evidence that might be developed during the trial in the case before you?"

A: "Yes, sir."

A. J. Schillaci: (J.S.T. 460) "I don't think I would have any problem finding a person guilty or not guilty."

Q: "But where that verdict of guilty necessarily necessarily imposes the death penalty, would that give you a problem?"

A: "It would give me a problem, yes."

Haywood Jackson: (J.S.T. 520)

Q: "You say you have been friends and have known Johnson Washington, Jr. as long as you can remember. And his family. Are you telling me, sir, that you could, in this case, assuming that you were convinced of the guilt of the accused beyond a reasonable doubt, could you consider, even consider rendering a verdict knowing that it would put Johnson Washington, Jr. to death by electrocution?"

A: (Indicates no.)

Edward W. James: (J.S.T. 656)

Q: "You would not even consider rendering a verdict knowing that verdict would necessarily carry the death penalty?"

A: "Not if it carried the death penalty."

The State submits that many of these excerpts speak for themselves in showing the validity of the trial court's rulings on the various challenges for cause. That these do not violate the rule of Witherspoon cannot be doubted.

However, such is not the case concerning the testimony of Monroe Douglas and A. J. Schillaci. From the record it would appear that the issues involved in the Witherspoon ruling were not fully amplified. In this instance the State feels that the record cannot possibly speak for itself. In determining whether a venireman is properly subject to a challenge for cause, the trial judge has broad discretion. Frazier v. U.S., 69 S.Ct. 201, 337 U.S. 497; reh. den. 69 S.Ct. 488, 336 U.S. 907. The mere showing of a possibility of prejudice of a prospective juror is not sufficient to require reversal due the ruling of the trial judge on a challenge for cause. Mares v. U.S., 383 F.2d 811, cert. den. 88 S.Ct. 1060, 390 U.S. 961. The judge in this case was satisfied as to the position taken by these two veniremen. This decision on the part of the trial judge is the result of much more than the words reported by the transcript; just as a jury assesses a witness, the judge considers the veniremen's demeanor, facial expressions, and the like. Additionally, the trial judge is in a uniquely advantageous position to assess the venireman in light of linguistic habits peculiar to the area. Certain words uttered, or a certain inflection affected, may have a radically different significance to a native of Killona, Louisiana than they have for a native of White Plains, New York. (See Appendix A) Resultantly, the discretion of the trial judge should not be disturbed without a showing of manifest error. From the record it is abundantly clear that due regard was had by all concerned for the strictures of Witherspoon in questioning all other jurors. From the record,

too, it is arguable that A. J. Schillaci was excused not for scruples as to the death penalty, but for his indication that before he could render a guilty verdict, he would require evidence which might never be brought out at trial. This is tantamount to a declaration that if certain evidence were not brought in, regardless of what the admitted evidence showed, A. J. Schillaci could not render an impartial decision as to guilt, knowing that verdict carried the death penalty. Regarding the testimony of Monroe Douglas, the State submits that it is fully within the discretionary province of the trial judge to find that several answers such as "No, I don't think so", considering all other aspects of the veniremen's behavior, constitute an unmistakably clear indication of Douglas's inability to impartially consider a verdict of guilty regardless of the evidence that might be developed. The opinion of the Louisiana Supreme Court supports this view:

> "Each of the excused jurors was questioned at length by the State and, in most instances, by the trial judge. The prospective juror was excused for cause only when the testimony made clear that under no circumstances could he return a verdict of guilty of first degree murder or that his fixed opinions prevented an impartial determination of guilt based upon the evidence."

State v. Washington, 321 So.2d 763, 766.

B. Witherspoon v. Illinois is not applicable to the present case.

The State of Louisiana feels that petitioner's assertion of Witherspoon violations is unfounded for reasons other than factual. For while the Witherspoon jury was responsible for determining both guilt and sentence, under LSA-R.S. 14:30

a mandatory, legislatively imposed death penalty is predicated upon a finding of guilt by the jury. This situation was contemplated by the Court in Witherspoon:

> "It is suggested in a dissenting opinion today that the State of Illinois might 'impose a particular penalty, including death, on all persons convicted of certain crimes'. Post at 1787. But Illinois has attempted no such thing. Nor has it defined a category of capital cases in which 'death (is) the preferred penalty'." Witherspoon v. State of Illinois 88 S.Ct. 1770, at 1774, N. 15, 391 U.S. 510 at 519.

The reason that such a statutory scheme is constitutional is that the jury decides only the issue of guilt, and the legislature defines the various factual elements necessary to convict. If the jury finds that these facts do exist, its job is finished. The Court must impose the legislatively prescribed sanction. In this particular case, the defendant was found to have come within the purview of LSA-R.S. 14:30(2). This case is a worthy example of the validity of the State's argument, for it is plain that a juror's feelings about capital punishment could have little or no effect upon his determination of the facts in such a case wherein the elements required for conviction are the following: (1) the killing of a human being; (2) with specific intent to kill or to inflict great bodily harm upon; (3) a peace officer engaged in the performance of his lawful duties. LSA-R.S. 14:30(2).

This Honorable Court hinted at the validity of such a position in Witherspoon, as it refused to erase the petitioner's conviction, confining its holding to the sentence alone:

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> "We simply cannot conclude, on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In light of the presently available information, we are not prepared to announce a per se constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was." 88 S.Ct. 1770, 1774; 391 U.S. 510, 518.

In light of the distinction between the fact-finding and sentencing functions emphasized by the Court in Witherspoon, the State submits that petitioner's Witherspoon argument does not apply to this case. The more appropriate inquiry would be as to the constitutionality of the statute itself, as was made in Moore v. State of Illinois, 92 S.Ct. 2562, 408 U.S. 786 (1972):

> "Inasmuch as the Court today has decided that the imposition of the death penalty under statutes such as those of Illinois is violative of the Eighth and Fourteenth Amendments, Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, it is necessary for us to consider the issue of non-compliance with the Witherspoon standards. In Witherspoon, 391 U.S. at 523 in N. 21, the Court stated specifically, 'Nor, finally, does today's holding render invalid the conviction, as opposed to the sentence, in this or any other case'." 92 S.Ct. at 2570.

Obviously, then, a consideration of Witherspoon standards is not appropriate where the death penalty is mandated by statute, and the jury's only function is the determination of guilt or innocence. Should the Court disagree with this contention however, the State of Louisiana would call the Court's attention to a passage in Boulden v. Holman, 89 S.Ct. at 1142, 394 U.S. at 484; quoted with approval in Maxwell v. Bishop, 90 S.Ct. at 1581, 398 U.S. at 266:

> "A further hearing directed to the issue might conceivably modify in some fashion the conclusion so strongly suggested by the record now before us... Finally, in the event it turns out, as now appears, that relief from the death sentence must be ordered, a local federal court will be far better equipped than are we to frame an appropriate decree with due regard to available (Arkansas) procedures."

In Boulden an Alabama statute provided that a juror's fixed opinion against capital punishment was good cause for challenge. Ala, Code, Tit. 30, Sec. 57. In Maxwell, Ark. Stat. Ann. Secs. 41-3404, 43-2153 gave the jury discretion to qualify a guilty verdict in capital cases by prescribing life imprisonment instead of death. In both, the Court expressed the opinion that a local court could better consider the Witherspoon problems than could a distant appellate tribunal. In this spirit, the State of Louisiana respectfully requests that petitioner's application for writs of certiorari be denied as to the Witherspoon issue.

III. Whether the Introduction at trial of petitioner's written confession and of a pistol which petitioner retrieved for the police violated his Fifth Amendment right against compulsory self incrimination.

Petitioner asserts the inadmissibility in evidence of his written confession on the basis that an earlier oral confession was coerced and therefore involuntary, such involuntariness being caused by (1) insufficient Miranda warnings, (2) the law intelligence of the defendant, and (3) protracted questioning coupled with physical abuse. Petitioner additionally asserts that the Louisiana Supreme Court employed an erroneous "totality of the circumstances" test in determining whether petitioner's waiver of his Fifth Amendment privilege was in fact voluntary.

The State asserts that the errors assigned by petitioner are without merit. Petitioner was advised of his rights at the time of his arrest, and again the following morning at which time he signed a written waiver before making his written confession. Between the time of his arrest on the evening of July 4 and the following morning, petitioner gave an oral confession to the police which was not introduced into evidence. It is this statement which petitioner contends was unconstitutionally obtained. (For a summary of the testimony pertinent to this issue, please see Appendix B).

The State charges that there is no issue as to whether petitioner was sufficiently apprised of his Miranda rights for purposes of his first statement. There is no requirement that an accused be continually reminded of his rights once he has intelligently waived them. United States v. Anthony, 474 F.2d 770, 773 (5th Cir. 1973). Petitioner was given his rights at the time of his arrest, indicated that he understood them, and later willingly made his confession, after having asked to see Deputy Coleman. Miranda warnings at this time were not required. A great many courts have held that repeated Miranda warnings are not necessary to a finding that a defendant, with full knowledge of his rights, knowingly and intelligently waived them. Biddy v. Diamond, 516 F.2d 118, 122 (5th Cir.,1975); Miller v. United States, 396 F.2d 492 (8th Cir. 1968)

Petitioner argues that under the circumstances of his arrest, the confession could not have been voluntarily made, considering the fact of petitioner's age and low intelligence. Low intelligence alone, however, does not vitiate the confession, State v. Edwards, 243 So.2d 806 (1971); State v. Nicholas, 319 So.2d 361 (1975). In Miller v. United States the Court countenanced a similar issue:

> "As we have indicated, the burden of establishing that the defendant, a thirty-five year old negro with a third or fourth grade education and a limited capacity to read or write, knowingly and intelligently waived his privilege against self-incrimination and his right to counsel was on the government and was a heavy one. Nonetheless, we believe that the trial court correctly determined the issue. It had an opportunity to observe the defendant and was in a position to form a judgment as to his ability to comprehend." 396 F.2d 492 at 495 (8th Cir. 1976); Cert. den. 393 U.S. 1031.

This principle extends not only to cases of low intelligence, but has been applied where the defendant was under narcotic influence at the time of his making the confession. United States v. Harden, 480 F.2d 649, 651 (8th Cir., 1973). Additionally, whether a consent to search is voluntary is a question for the trier of facts and its finding, if substantially supported, should not be disturbed on review. United States v. Springs, 460 F.2d 1344 (7th Cir., 1971); Byrd v. Lane, 398 F.2d 750, 752 (7th Cir. 1968), cert. den. 89 S.Ct. 625, 393 U.S. 1020, 21 L.Ed.2d 564 (1969); United States v. Thompson, 356 F.2d 216, 220 (2d Cir. 1965), Cert. den. 86 S.Ct. 1591, 384 U.S. 964, 16 L.Ed.2d 675 (1966). This rule has equal application to the Court's findings in regard to petitioner's assertion that he was subjected to physical abuse. The government need only prove voluntariness by a preponderance of the evidence, United States v. Watson, 469 F.2d 362 (5th Cir. 1972), and where there are conflicting facts or conflicting inferences, the determination of voluntariness of a confession is primarily one for the trial court. Lyons v. State of Oklahoma, 64 S.Ct. 1208, 322 U.S. 596, 88 L.Ed. 1481; Brulay v. United States, 383 F.2d 345 (9th Cir. 1967), Cert. den. 88 S.Ct. 469, 389 U.S. 986, 19 L. Ed.2d 478. At the hearing on the motion to suppress, the evidence put on by the defense was substantially controverted by the testimony of a number of police officers and one doctor. In the light of prior jurisprudence that the trial courts's findings should stand is manifest.

Petitioner contends that the Louisiana Supreme Court erred in that it utilized a "totality of the circumstances" test to determine voluntariness. The Court, says: "The question must always be whether the State has borne its burden of proving that the defendant was advised of his rights, that he voluntarily elected to make a statement, and that his confession was otherwise free and voluntary." State v. Washington, 321 So.2d 763, 767. Even so, in determining voluntariness, the Court may consider factors enumerated in pre-Miranda decisions because the underlying issue is the same in pre- and post-Miranda cases: whether there was a voluntary decision to speak. United States v. Blocker, 354 F.Supp. 1195. Not only for these reasons is petitioner's contention without merit, but this Honorable Court itself has in 1969 said that "the question of voluntariness necessarily turns on the totality of the circumstances." Boulder v. Holman, 89 S.Ct 1138, 394 U.S. 478, 22 L. Ed.2d 433; Ferguson v. Boyd, 397 F. Supp. 129. Were this not the case, however, petitioner would still be unable to validly raise this argument, for there exists no constitutional requirement that a state trial court articulate its credibility findings involving a factual dispute over the voluntariness of a confession. Sands v. Rose, 396 F.Supp. 257 (1975). And "the mere fact that the trial court did not formally enunciate the test in full does not change the correctness of (its) ruling." United States v. Harden, 480 F.2d 649 (1973).

Petitioner argues that the written confession used as evidence was invalidated as a result of the involuntariness of the first confession. The Louisiana Supreme Court, however, found no basis in the record for even holding the first confession inadmissible. 321 So.2d 763, 768. The State embraces this position wholeheartedly. However, should this Court disagree, the State respectfully submits that the second confession was sufficiently insulated from the first so as to render it voluntary and admissible. Before making said confession, petitioner was again warned of his rights and signed a written waiver. He then gave his confession to an officer with whom he had had no contact since the time of his arrest. In Clewis v. State of Texas, 87 S.Ct. 1338, 386 U. S. 707 (1967), the Court's

finding that a later confession was not sufficiently insulated from two earlier ones turns materially on the fact that the defendant was never advised of his right to counsel or of his right to remain silent. Certainly that is not the case here. Petitioner was twice advised of his rights, and elected to sign a waiver of his own volition. It is submitted that Fisher v. Scafati, 439 F.2d 309 at 311 (1st Cir. 1971), is relevant. In that case a confession was obtained without the required warnings, followed by a later confession preceded by Miranda warnings. The Court there held that the use of both confessions as evidence invalidated the conviction. The implication raised thereby is that the second confession would have been properly admitted without the first. Similarly, in United States v. Wagner, 497 F.2d 249 (10th Cir. 1974), the defendant held two (2) conversations with a police officer. The first time no Miranda warnings were given, and the defendant consented to a search. Later, the defendant was advised of his rights and talked with the officer. The Court there held that the second statement was not the "poisonous fruit" of the first interrogation, Wong Sun v. United States, 83 S.Ct. 407, 371 U. S. 471, 9 L. Ed.2d 441, recognizing that the evidence was to be viewed in the light most favorable to the government. United States v. Twilligear, 460 F.2d 79, 81-82 (10th Cir. 1972).

The State of Louisiana respectfully contends that the facts of this issue are justly susceptible to the application of settled jurisprudential law and that the ruling of the Louisiana Supreme Court was proper thereunder. Accordingly, the petition for Writs of Certiorari should be denied.

Respectfully submitted:

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA

MELVIN P. BARRE
DISTRICT ATTORNEY
29TH JUDICIAL DISTRICT

NORMAN J. PITRE
ASSISTANT DISTRICT ATTORNEY
29TH JUDICIAL DISTRICT

WALTER L. SMITH, JR.
ASSISTANT ATTORNEY GENERAL
STATE OF LOUISIANA

BY: _____
WALTER L. SMITH, JR.
1885 Wooddale Blvd.
Suite 1010
Baton Rouge, Louisiana 70806
504/389-7171

C E R T I F I C A T E

I here by certify that a copy of the above foregoing Opposition to Petition for Writ of Certiorari to the Supreme Court of the United States has this date been served on petitioner by mailing a copy of same to his counsel of record:

Jacques F. Bezou
1304 First National Bank of
Commerce Building
New Orleans, Louisiana 70112

in the United States mail postage prepaid.

Baton Rouge, Louisiana, this 19th day of March, 1976

WALTER L. SMITH, JR.
1885 Wooddale Boulevard
Suite 1010
Baton Rouge, Louisiana 70806
Phone: 389-7171

APPENDIX A

Geist, Robert, AN INTRODUCTION TO LANGUAGE. Toronto: The Macmillan Company (1970).

CHAPTER FIVE Place and Time in Language

REGIONAL DIALECT

As we have already indicated in discussing idiolect, language varies geographically or regionally. Most people, fully aware of such variation, term it simply *dialect* rather than *regional* or *geographical dialect*. No linguistic phenomenon is more generally interesting, if we can judge by the numbers of articles about it in the popular press. No linguistic phenomenon is more amusing, for it's always the other fellow who speaks a dialect. We, wherever and whoever we may be, speak the king's English, of course. Within our own speech community, large or small, we are at home, and everyone's speech is essentially normal. A Texan admirer of former President Johnson, for example, was quoted as saying that "the nahss part is at last we got a PrezziDENT who hasn't got any accent!"

Regional Diff

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where else American
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groups of words var

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ask, laugh, class,
tune, Tuesday, d
how, now, brown
hog, fog, God, so
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Regional Differences in the United States

Probably thanks to movies, radio, television, and the great amount of traveling we do, Americans are generally aware of regional differences in the United States. We're aware, for example, that eastern New Englanders—and some Americans elsewhere—pronounce no *r* in words like *bird, foe, far, fear.* Almost everywhere else Americans pronounce *r* in these words. New Englanders also pronounce an *r*—as in *the umbrellar in, the idear of*—where most of the rest of us pronounce no *r*. Even if we can't tell what variations belong where, we are likely to know that the following groups of words vary in the way Americans pronounce them:

room, broom, roof, root, soot
ask, laugh, class, path
tune, Tuesday, dude, new
how, now, brown, cow
hog, fog, God, sorry
marry, Mary, merry
when, where, whether, whistle

Varied vocabulary items are perhaps less well known than varied pronunciations. The words or phrases often refer to relatively humble objects or acts which do not get mentioned too regularly in conversations between people from different parts of the United States. (One can hardly avoid pronunciation in any conversation.) On occasion, however, purely local terms in a conversation lead to misunderstanding. A Northerner had no idea that a *paling* could be climbed over. A Southerner had no idea that *eaves troughs* collected rain. An Air Force wife from Kansas was horrified when a New England wife, inspecting the kitchen as a prospective house buyer, remarked approvingly that the cupboards were well equipped with *spiders.*

Some equivalent terms† used in various parts of the country include the following:

brook	run	branch
burlap bag	gunny sack	tow sack

† The terms are taken from Hans Kurath, *Word Geography of the Eastern United States* (Ann Arbor: The University of Michigan Press, 1949).

stone fence	stone wall	rock fence	
quarter of six	quarter to six	quarter till six	
kindling wood	lightwood	pitch pine	
clothes closet	clothespress		
cow pen	cuppin	milk gap	
rail fence	worm fence	snake fence	
pail	bucket		
faucet	spicket	tap	
whippletree	swingletree	whiffletree	
seesaw	teeter	teeterboard	teeter-totter
sawhorse	sawbuck	wood jack	saw bench
kerosene	coal oil	lamp oil	carbon oil
cow's *moo*	low	lower	
co-boss! bossie!	sook! sookie!	co-wench! co-inch!	
wishbone	pulley bone	lucky bone	
corn bread	johnnycake	pone, corn pone	
cottage cheese	curd cheese	pot cheese	smearcase
angleworm	fish worm	fishing worm	
sycamore	buttonball	buttonwood	
sick to the stomach	sick in the stomach	sick on the stomach	
take you home	carry you home		
darning needle	snake feeder	snake doctor	mosquito hawk

Items that might be considered grammatical rather than vocabulary include *They do it any more* (which sounds impossible to many Americans); the plurals *you-all, you'ns, youse, mongst-ye*, the *up north, down south, over east, out west* reported from *out here* in Columbus, Indiana.

A serious attempt to correlate linguistic variation with geography is the Linguistic Atlas of the United States and Canada, under the leadership of Hans Kurath, professor emeritus at the University of Michigan. In progress since the late 1920's, the project will eventually draw a linguistic map of English-speaking North America. Trained linguists ("field workers") gather information directly from bona fide local residents (the "informants"). So far numerous partial maps of the United States have been drawn. *Isoglosses* show the geographical boundaries of various pronunciations, words, and grammatical expressions. Bundles of isoglosses indicate areas that share common features.

Social dialect is given due attention through the selection of three types of informants—roughly, (1) those with not more than

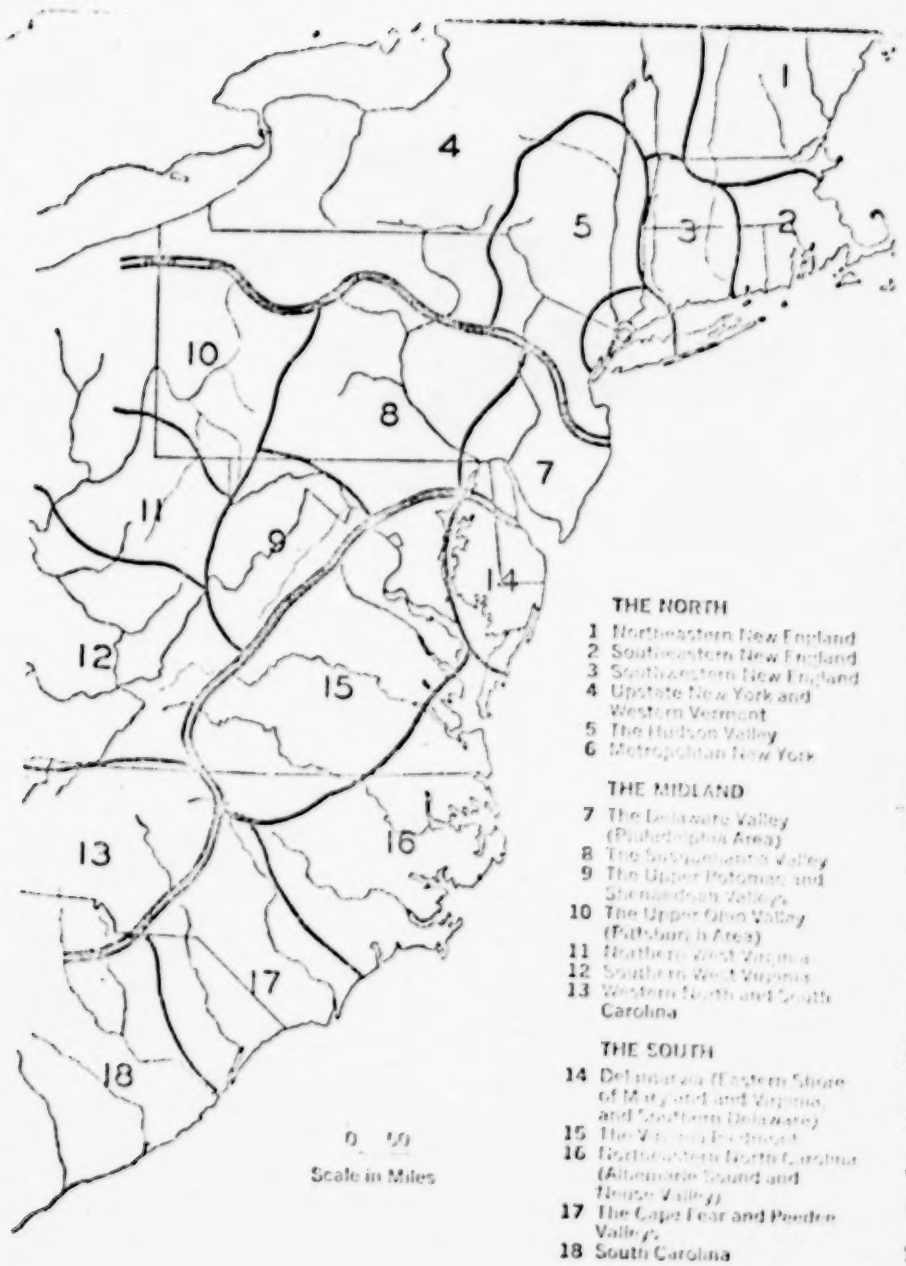
a grade-school education, (II) those with a high-school education, and (III) those with a college education. Changes in time also receive consideration, for older and younger informants are sought in each of the groups. The most significant result of the project to date is the discovery of distinctive Northern, Midland, and Southern dialect areas. Previously even linguists had divided all of the English language in America into these three parts: New England, Southern, and General American. New England east of the Connecticut River remains very distinctive but is considered a sub-area of the Northern area, just as New York City is.

In the past, languages got places only when people moved to those places, taking their language with them. Radio and television did not complicate matters. Unsurprisingly, then, dialect areas correlate with the migration of people. The three dialect areas (see the map on p. 88) are clearest along the Atlantic coast. With the westward movement beyond the Mississippi, the dialect areas west of the river are more difficult to define clearly, but, according to investigators, dialects there are still distinctive.

We may submit X's idiolect, which was described in Chapter Three, to the dialect criteria set up as distinctive by the Atlas investigators.[1] X was born in western New York and remained there pretty completely for his first twenty years. That is, he belongs to the Northern area. His speech meets almost all of the Atlas criteria for Northern speech. This is especially true of the speech of his childhood, before he advanced beyond the elementary-school education of his parents. Like a good Northerner, X did not rime *with* with *myth*. He rimed *root* with *foot*. He pronounced the word for the flesh around the teeth (*gums*) to rime with *blooms*, not with *mums*. Most of the time he still pronounces the second syllable of *because* like the first syllable of *cousin*, not like *cause*. He still uses the /s/ sound in *grease* and *greasy*.

X always used *pail*. The Midland and Southern *bucket* was just a word in an old-fashioned song, "The Old Oaken Bucket." Garbage was *swill*, never *slop*. X pronounced and pronounces *clapboards* without a /p/. He would not understand *weatherboards* or *weatherboarding* as substitutes. He used *brook* for a very

[1] The best short summary is by Raven I. McDavid in "The Dialects of American English," which he wrote as Chapter 9 of W. Nelson Francis's *Structure of American English* (New York: The Ronald Press Company, 1958). McDavid's list of distinctive items begins on p. 513.



The Speech Areas
of the Eastern States

small stream, especially for a bubbly *one* in the woods, and *crick* for a larger one. Even now he would not understand *run* or *branch* as synonyms for *brook* or *creek*. The seed inside a cherry is and was a *pit*. X gathered *angleworms* for fishing before he studied about *earthworms* in books. X's father repaired *eaves troughs* and *gutters*, not *spouts*. His mother fried food in a *spider*.

When X wanted to swim, he *dove* into the water, and he still finds *dived* strange and affected. At times he is and was sick *to* his stomach—never *in*, *at*, or *on* his stomach. He still uses *hadn't ought* but finds the *might could* and *use to could* of a Virginia-born friend strange indeed. X does not remember using such Northern terms as *all to once*, *he to home*, *it wa'n't me*, or the past tenses *see*, *clim*, and *begin*. He does remember losing *ain't*, *youse*, and past-tense *seen* to energetic schoolteachers in the third to fifth grades. X's speech disagrees importantly with only one Atlas indication of Northern speech. That is, X has always pronounced *mourning* and *morning*, *hoarse* and *horse* as homonyms. He remembers attempts by his teachers to keep him from pronouncing the words alike. The teachers failed. They had no more effect on his *hoarse* and *horse* than on his homonyms *aunt* and *ant*. All of his aunts would have laughed—or smiled indulgently—if he had tried to distinguish them by sound from the insects.

X pronounces *Tuesday*, *due*, *new* in the manner characteristic of eastern New England as well as the North Midland (to northern Pennsylvania). *Tuesday* begins like *too*, *new* is like the beginning of *noose*, and *due* is a homonym for *do*. Otherwise, X uses none of the terms characteristic of eastern New England. He does not use *pigsty*, *buttonwood*, *sour-milk cheese*, *apple dowdy*, or *bonny-clabber*. He doesn't know what the last three terms mean.

Along with the speakers of Inland Northern (the Northern settlement areas of the Great Lakes Basin and the Upper Mississippi Valley), X keeps his *r*'s after vowels. He also uses the vowel of *father-lather* in *on*, *fog*, and, originally, *hog*. However, *frog* rimed and rimes with *dog* and *log*, which have the vowel of *law* and *flaw*. He used *stoop* for "a small porch without a roof." Anything large and covered was a *verandah*.

X apparently has a Midland pronunciation for *wash* as well as *frog* (the vowel of *law*). He has never used Midland *blinds* for "window shades," *snake feeder* for "dragonfly," or *poke* for "paper sack or bag." In his childhood, a dragonfly was the Northern

darning needle, which sewed little boys' ears up. The Midland *a little piece* for "a short distance" sounds quaint and rustic. No farm boy, he never called cows. Still the Northern call *co-bossie* or *bossie* was familiar as a term for a cow. The Midland *sookl* was and is totally unfamiliar. The terms *skillet* for "frying pan" and *green beans* and *snap beans* for "string beans" are now familiar. He doesn't remember when he learned them.

X's pronunciation of *Tuesday, new, due* is apparently distinctively North Midland, along with *crick*. His use of *smearcase* probably derives from his German-born parents rather than from the Pennsylvania Germans. At least, he is totally unfamiliar with other terms ascribed to them: *ponhaws, thick milk, toot* (rimes with *foot*, for "paper bag").

Except for terms and pronunciations already noted, plus *spook* (North Midland for "ghost"); *ourn, yourn, hisn*, and *hern*; a /w/ pronunciation to begin *whip* and *wheelbarrow*; *clothes press* for "clothes closet," and *snack* for "a light lunch between meals"; X is conspicuously unfamiliar with terms and pronunciations that the Atlas has found to be non-Northern. He would have to consult a dictionary for many of the terms.

Some of the specific results of the Linguistic Atlas are readily available in the following interesting and instructive books:

Atwood, E. Bagby. *A Survey of Verb Forms in the Eastern United States*. Ann Arbor: The University of Michigan Press, 1953.

Kurath, Hans. *A Word Geography of the Eastern United States*. Ann Arbor: The University of Michigan Press, 1949.

Kurath, Hans, and others. *Linguistic Atlas of New England*. 3 volumes and a handbook. Washington, D. C.: American Council of Learned Societies, 1939–43. (Available from Columbia University Press.)

Kurath, Hans, and McDavid, Raven I., Jr. *The Pronunciation of English in the Atlantic States*. Ann Arbor: The University of Michigan Press, 1961.

British vs. American English

The differences between American dialects are slight. Those between British dialects and between British and American are far

APPENDIX B

Excerpt from the Appellate Brief of the State of Louisiana in State v. Washington, 321 So.2d 763, summarizing testimony relevant to the voluntariness of petitioner's confessions.

examination in felony cases... [A]rticle 292 further provides that after the finding of an indictment or the filing of an information, an order for a preliminary examination in felony cases may be granted by the court at any time either on its own motion or on request of the State or of the defendant. "* * * the law is well settled in this state and under the federal system that, since the purpose of a preliminary hearing is to determine probable cause, no such hearing is required where the defendant has been indicted by a Grand Jury [the same principle applies to the filing of a bill of information] because the fact of indictment evidences probable cause. * * *" State v. Singleton, 253 La. 18, 215 So.2d 838, 839, 840 (1968). Therefore, after the finding of an indictment, or the filing of an information, an order for a preliminary examination in felony cases is a matter within the sound discretion of the presiding judge. State v. Hudson, supra."

Even the recently amended Article 292 of the Code of Criminal Procedure and the 1974 Constitution leave untouched the discretion of the trial court after the filing of an indictment. Article I, § 14, Louisiana Constitution, 1974.

As stated above, in the instant case, on the day the indictment for murder was handed down, the defendant's counsel agreed that the preliminary hearing would be moot. In light of this and C.Cr.P. Article 292, the State submits that the trial court did not abuse its discretion in refusing to grant defendant's motion for a preliminary examination.

ASSIGNMENT OF ERROR NO. 4

Assignment of Error No. 4 was reserved by appellant based on the refusal by the trial court to grant defendant's motion to suppress the voluntary statement made by the defendant.

In relation to such a voluntary statement, the Supreme Court of the United States has stated:

"...As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently..." Miranda v. State of Arizona, 86 S.Ct. 1602, 384 US 436, 16 L.Ed. 2d 694 (1965).

The State submits that all the necessary safeguards dictated by the Miranda decision, in relation to the defendant's statement of July 5, 1973, have been followed in the case at bar.

Deputy Nelson Coleman testified that he was present when the defendant was arrested on the night of July 4, 1973, at about 11:50 p.m. He testified that he saw the defendant 10 or 12 times, and that he saw no one strike the defendant during the night. He also testified that he saw no cuts or bruises on the defendant the next morning.

He further testified that at the time of the arrest, Deputy St. Pierre had his waiver card out containing the Miranda rights, and that he thought he heard the deputy reading the rights to the defendant. (Tr. p. 14, January 18, 1974)

He also testified that the defendant's admission as to the location of the gun was made freely and voluntarily to him. (Tr. p. 7)

Mr. Cary Zeringue testified that he took pictures of the defendant at the time he was detained in the jail cell shortly after his arrest, and that he observed no marks or bruises on the defendant. (Tr. p. 23, January 18, 1974)

Mr. Claude Loque testified that he was present in the courthouse for most of the night, and that he observed no one striking or abusing the defendant. He testified he saw the defendant four or five times that night, in the course of making his nightly rounds, from the time the defendant was incarcerated until he served his breakfast at 8:00 a.m. the following morning, and that he observed no abuse whatsoever being directed at the defendant. (Tr. p. 27-28, January 18, 1974)

Dr. Wilson Couch examined the defendant about 30 days later, and he testified that he observed no signs of abuse on his person.

Detective V. J. St. Pierre testified that, immediately after

arresting the defendant, he read him his rights as dictated by the Miranda decision, and that he never hit or abused, nor saw anyone else hit or abuse the defendant. (Tr. p. 75, January 18, 1974) He further testified that once the defendant was brought to jail, he again read him his rights and produced a waiver of rights sheet, which the defendant signed. He then asked the defendant if he would like to say anything and the defendant voluntarily gave the deputy his statement. The deputy testified in relation to this that the defendant voluntarily waived his rights, and that there was no interrogation, but that the defendant gave his statement freely and voluntarily. (Tr. p. 79-80, January 18, 1974)

Finally, Detective Kimball testified that he saw and heard Deputy St. Pierre read defendant his rights at the time the defendant was arrested, and that he saw no one strike or abuse the defendant at that time, or while the defendant was being taken to jail in the police car. (Tr. p. 99-100, January 18, 1974)

In the instant case, there is the testimony of no less than six people, five of whom were police officers, who either arrested the defendant or saw him at various times during the night he was arrested and the morning after when he gave his statement, and all this testimony is to the effect that the defendant was not abused physically or threatened with abuse at any time during the night. There is further testimony, corroborated by the deputies, to the effect that the defendant was advised of his rights as per the guidelines laid down by the Miranda decision, that he waived these rights, and that the statement was free and voluntary in accordance with LSA-R.S. 15:451:

> "Before what purposes [purports] to be a confession can be introduced in evidence, it must be affirmatively shown that it was free and voluntary, and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises."

There can be no doubt that this statement is admissible into evidence and that the trial court was correct in refusing to grant defendant's motion to suppress the statement.